88- 1372

Supreme Court, U.S.
FILED
AUG 1 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

JAMES BUCKLES, a/k/a
JIMMY BUCKLES,

Petitioner

vs.

THE UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the Trial Court committed reversible error by failing to permit the Appellant to withdraw his guilty plea when there is a complete and total absence of a record of the Rule 11 proceeding?

TABLE OF CASES

1. Boykin v. Alabama, 395 United States 238 (1969)

2. McCarty v. United States, 394 United States (19

3. Goodwin v. United States, 687 F.2d 989 (7th cir 1983)

4. United States v. Coronado, 554 F. 2d 166 (5th Cir (1980)

5. United States v. Bird, 621 F. 2d 166 (5th Cir. 1977)

6. United States v. Dayton, 604 F. 2d 931 (5th Cir. 1979)

TABLE OF AUTHORITIES

Federal Rules of Criminal Procedure Rule 11(g)

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OPINION BELOW

The Court of Appeals for the Eleventh Circuit entered a judgment affirming the order of The United States District Court for the Southern District of Alabama, Southern Division, which denied Petitioner's motion to withdraw his guilty plea. A copy of this order, dated April 27, 1988, is attached as appendix A.

The court denied Petitioner's petition for rehearing on May 31, 1988. A copy of the order is attached as appendix B.

JURISDICTION

The jurisdiction of this court is invoiced under Title 28, United States Code, Section 1254 (1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment 5

Nor shall any person .... be deprived of life, liberty, or property, without due process of law ....

STATEMENT OF THE CASE

(i)

Course of proceedings and dispositions in the Court below.

** The Defendant-Appellant in this case is incarcerated **

On November 20, 1981, Defendant-Appellant James Buckles was indicted by a United States Grand Jury for the Southern District of Alabama, said indictment charging five counts of violations of Federal law (R 1-7-1). Counts One, Two and Three thereof charged respectively, distribution and possession with intent to distribute of Methaqualone; possession with the intent to distribute of Marijuana; and possession with intent to distribute of Methaqualone, in violation of Title 21 U.S.C. Section 841(a)(1) (R 1-7-1). Count

Four charged receiving, concealing and selling American Express Travelers Checks of a value of more than $5,000.00 which were a part of interstate commerce, in violation of Title 18 U.S.C. Section 2315 (R 1-7-2). Count Five charged possession of firearms after having previously been convicted of a felony, in violation of Title 18, appendix, U.S.C., Section 1202(a)(1) (R 1-7-2,3).

On December 9, 1981, Attorney Bob Sherling was appointed by the Court as counsel for Buckles (R 1-9-1). Buckles was arraigned and entered a plea of not guilty to the indictment on December 14, 1981 (R 1-10-1). A $100,000.00 corporate surety bond was approved for Buckles on December 18, 1981 (R 1-11-1). This was pursuant to an order of release by the Court setting a $100,000.00 surety bond (R 1-11-4).

On January 25, 1982, Buckles withdrew his plea of not guilty as to Counts One, Two, Three and Five of the indictment, and

entered a plea of guilty to those counts, with Count Four of the indictment being dismissed on oral motion of the United States Attorney (R 1-16-1). Imposition of sentence was postponed to March 26, 1982. On March 1, 1982, the bail of the Defendant was rescinded due to the fact that correspondence to him at the address he had given to the Court had been returned to the Court as undeliverable, and the United States Marshal was directed to take the Defendant into custody (R 1-18-1). On the date set for sentencing, March 26, 1982, Buckles failed to appear and a warrant for arrest was issued (R 1-20-1).

On September 25, 1985, a return of the United States Marshal was filed indicating that Buckles had been arrested in the Southern District of Georgia (R 1-34-1).

On September 30, 1985, a motion was filed by Buckles to withdraw his guilty plea (R 1-35-1), as to which the Court

ordered that the motion was denied, with leave to amend the same on or before October 16, 1985 (R 1-36-1). Such an amended motion was filed on October 16, 1985 (R 1-37-1). The Court then ordered that an evidentiary hearing be scheduled on the motion to withdraw guilty plea (R 1-38-1).

An evidentiary hearing was held on the motion on December 16, 1985 (R 1-42-1). On April 15, 1986, the Court entered a memorandum opinion and order denying the motion (R 1-42-1,4). At such time, the Defendant was undergoing medical treatment, and sentencing was ordered rescheduled as soon as the Defendant's medical condition would permit his return for sentencing (R 1-42-4).

Sentence was imposed on November 5, 1986 (R 1-43-1). Buckles was sentenced to imprisonment for five (5) years on Count One, five (5) years on Count Two, five (5)

years on Count Three, and two (2) years on Count Five, all of said sentences to run consecutively to each other and consecutively to any other sentences which the Defendant was then serving; a five (5) year special parole term was also imposed on Counts One, Two and Three, the same to run concurrently (R 1-43-2).

A motion for leave to proceed on appeal in forma pauperis was filed by Buckles on November 7, 1986 (R 1-44-1), which was granted on November 17, 1986 (R 1-46-1). Buckles' notice of appeal was filed on November 12, 1986 (R 1-45-1).

The case was affirmed by the United States Court of Appeals for the Eleventh Circuit on June 8, 1988. A Timely Motion for Reconsideration was filed on May 11, 1988, but was denied by the Eleventh Circuit on May 31, 1988.

REASON FOR GRANTING THE WRIT

Petitioner asserts that when the Trial Court fails to provide for a verbatim transcript of a plea of guilty, prior to the time of sentencing, due process demands that the plea of guilty be setaside upon proper motion being made by the petitioner. It is uncontroverted that there exists no record of the petitioner having ever entered a guilty plea.

The United States Supreme Court in Boykin v. Alabama, 395 U.S. 238 (1969), held that " a plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction. Nothing remains but to give judgment and determine punishment." 395 U.S. at 279. The Court points out specifically that in a plea of guilty the accused is waiving his Fifth Amendment Right against self-incrimination, as well

as, his Sixth Amendment Right to trail by jury and his right to confront his accusers. 395 U.S. at 279. The Court then held that a presumption of waiver of these important constitutional rights could not come from a silent record. 395 U.S. at 280.

Petitioner's position is supported in part by the Federal Rules of Criminal Procedure, Rule 11 (g), which provides in part as follows:

> Record of proceedings. A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or nolo contendere, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry nto the accuracy of a guilty plea. (emphasis supplied)

This Honorable Court has set up two purposes of Rule 11 in the case of McCarthy v. United States, 394 U.S. 459 (1969). This

Court held that Rule 11 is designed, first, " to assist the District Judge in making the constitutionally required determination that a defendant's guilty plea is truly voluntary", and, "to produce a complete record at the time the plea is entered of the factors relevant to this voluntariness determination", 394 U.S. at 465.

When the record is silent as to the voluntariness of a plea of guilty, as would be the case in a lost record, the Appellant Courts in following McCarthy have generally concluded that the accused should be allowed to plead anew. Goodwin v. United States, 687 F. 2d 298 (7th Cir. 1983); United States v. Bird, 621 F.2d 989 (9th Cir. 1980); and United States v. Coronado, 554 F.2d 166 (5th Cir. 1977).

Specifically, the Fifth Circuit in United States v. Coronado, Supra, held that failure to comply with Rule 11 mandates reversal notwithstanding evidence by the

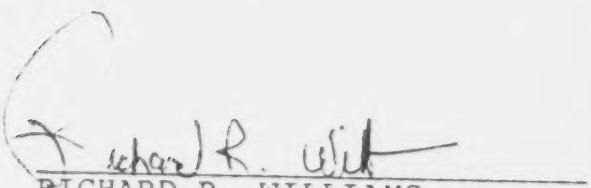
government that compliance with the rule would not have affected the plea or that the plea was voluntary, 554 F.2d at 173-174. Following precedent in McCarthy, the Fifth Circuit ordered the guilty plea be set aside.

Remedies for noncompliance with Rule 11 was further denied by the Fifth Circuit in United States v. Dayton, 604 F.2d 931 (5th Cir. 1979), Cert. denied 445 U.S. 904 (1980), where the Court held that a verbatim record of the proceedings of a guilty plea must be made by the Trail Court. The Court further held that any failure to record Rule 11 proceeding would require reversal except in those circumstances the nature of which the Court could not then imagine.

Conclusion

For the foregoing reasons, Petitioner James L. Buckles respectfully requests that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

Respectfully Submitted,



RICHARD R. WILLIAMS
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Dated July 29, 1988

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1988

JAMES L. BUCKLES,
Petitioner

vs.

THE UNITED STATES OF AMERICA,
Respondent

PROOF OF SERVICE

I, Richard R. Williams, after being duly sworn, disposes and says that pursuant to Rule 28.4(a) of this Court he served the foregoing petition for Writ of Certiorari to the Court of Appeals for the Eleventh Circuit on counsel for the respondent by mailing same by United States mail, properly addressed and first class postage prepaid on this the 29th day of July 1988 to:

Solicitor General of the United States

Department of Justice

Washington, D.C. 20530

Richard K Willard

Subscribed and sworn to before me

this 29th day of July, 1988.

Susan Smith

Notary Public

My Commission Expires 10-18-89

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-7826

D.C. Docket No. 81-00068

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAMES BUCKLES, a/k/a
JIMMY BUCKLES,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA

Before RONEY, Chief Judge, CLARK, Circuit Judge, and MORGAN, Senior Circuit Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Alabama, was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of conviction of the said District Court in this cause by and the same is hereby, AFFIRMED.

Entered: April 27, 1988
Miquel J. Cortez, Clerk

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-7826

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAMES BUCKLES, a/k/a
JIMMY BUCKLES,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF
ALABAMA

ON PETITION FOR REHEARING
May 31, 1988

Before RONEY, Chief Judge, CLARK, Circuit Judge, and MORGAN, Senior Circuit Judge.

The petition for rehearing filed by Appellant, JAMES BUCKLES, is denied.

Entered for the Court:

Paul H. Roney, United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DIVISION OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

versus CASE NO. 81-00068

JAMES BUCKLES, a/k/a
JIMMY BUCKLES

ORDER

The motion for leave to proceed on appeal in forma pauperis filed by the defendant on November 7, 1986, is granted.

DONE this 17th day of November, 1986.

Emmett R. Cox,
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DIVISION OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

versus CASE NO. 81-00068

JAMES BUCKLES, a/k/a
JIMMY BUCKLES

MEMORANDUM OPINION AND ORDER

This matter is before the court on the Rule 32(d) motion filed by the defendant on october 16, 1985, seeking an order allowing him to withdraw the plea of guilty which he entered on January 25, 1982. An evidentiary hearing was held on the motion on december 16, 1985. The court has withheld a ruling on the motion pending efforts to augment the tape recording which was made of the Rule 11 hearing, but is now advised that the type cannot be made audible.

Having considered the testimony, and heard from counsel, the court entered the

following findings of fact and conclusions of law:

1. On January 25, 1982, the defendant entered a plea of guilty to Counts One, Two, Three and Five of the indictment in this case. The defendant, having been release on bail pending sentencing, did not appear for sentencing, and became a fugitive. The court judicially knows from its own records in Criminal Case No. 85-00141 that Buckles was apprehended and arrested in the Southern District of Georgia on September 13, 1985, and returned to this District. He was convicted in this District on November 19, 1985, for failure to appear at sentencing in this case in violation of 18 U.S.C. section 3150.

2. The motion to withdraw his plea of guilty in this case asserts that he was mentally impaired when his plea was entered because of a physical illness and, additionally, that he entered a plea of

guilty because his court appointed attorney failed to prepare the matter for trial an insisted that he plead guilty.

3. Mr. Buckles was originally represented in this matter by attorney J.D. Quinlivan, Jr., who was retained, and who appeared for him at arraignment on November 3, 1981. On December 9, 1981, attorney Bob Sherling was appointed to represent Mr. Buckles, and represented him through the time he entered a plea of guilty.

4. For some reason -- and the court is not sure why -- the notes of the court reporter who was in attendance at the time of the Rule 11 hearing on the defendant's plea of guilty cannot be located. The court is satisfied that a careful search has been made, and the notes have either been lost or inadvertently destroyed, due no doubt in part to the long lapse of time.

5. While the inability to produce a transcript of the Rule 11 hearing is

unfortunate, the court is of the opinion that that fact alone does not require the granting of the motion in question. See Weaver v. United States, 317 F. Supp. 4 (E.D. Missouri 1970), aff'd. 437 F.2d 431 (8th Cir. 1971). The defendant's motion does not allege that the court failed in any way to comply with Rule 11 in accepting the defendant's plea of guilty. Additionally, no evidence was offered which suggests in any way that the court did not fully comply with Rule 11 in accepting the defendant's plea of guilty.

6. While the court claims no independent recollection of the matter, it is the invariable practice of the undersigned Judge to inquire relative to whether or not the defendant has any physical or mental problem which would make it difficult for him to understand the proceedings, and if the response is in the affirmative, to refuse to go forward.

Because that is the invariable practice of the undersigned Judge, the court is satisfied that the inquiry was made of the defendant at the Rule 11 hearing and that he responded in the negative.

7. The court finds that Mr. Buckles testimony relative to his physical condition at the time of the Rule 11 hearing is not credible. Additionally, the court finds that his decision to plead guilty was made prior to the morning of the Rule 11 hearing. Any physical or mental problem which the defendant had at the time of the hearing was not such as to affect his ability to make a knowing and voluntary plea.

8. Mr. Sherling is a conscientious and capable member of the Bar of this court. Mr. Buckles' testimony that he entered a plea under duress from Sherling, who insisted that he do so, is rejected as lacking credence.

9. The behavior of the defendant in

this case has, from the beginning, been that of one who seeks to avoid trial and avoid punishment. He belated assertion that he is innocent and wants a trial is unconvincing.

10. The court has considered the factors articulated in United States v. Presley, 602 F.2d 709, 711 (5th Cir. 1979), and concludes: (1) that the defendant was afforded effective assistance of counsel; (2) that the original plea was knowing and voluntary; and (3) that consideration of the conservation of judicial resources dictates that there be no attempt to try this case on the merits after this long, inordinate and inexcusable delay which is attributable to the conduct of the defendant in the case.

11. The defendant has shown no "fair and just reason" to allow withdrawal of his plea of guilty.

For the above reasons, the motion to withdraw the plea of guilty is DENIED.

The Court is informed that the defendant

is still undergoing medical treatment at Springfield as a result of injuries he received in a recent attempt to escape from the City Jail where he was being held in federal custody. The Clerk is requested to schedule sentencing in this case as soon as his medical condition permits his return here for sentencing.

DONE this _____ day of April, 1986.

Emmett R. Cox
United States District Judge

U.S. v. BUCKLES

UNITED STATES of America,
Plaintiff-Appellee,

v.

James BUCKLES, a/k/a Jimmy
Buckles, Defendant-Appellant.

No. 86-7826.

United States Court of Appeals,
Eleventh Circuit.

April 27, 1988.

Defendant filed a motion to withdraw his guilty plea. The United States District Court for the Southern District of Alabama, No. CR 81-00068, Emmett Ripley Cox, Jr., denied the motion. Defendant appealed. The Court of Appeals, Morgan, Senior Circuit Judge, held that: (1) the defendant could not complain of coercion by his attorney where the attorney recommended that the defendant plead guilty after the attorney used his best professional judgment; (2) any alleged mental impairment resulting from

medication for a respiratory infection did not affect the decision to plead guilty; (3) the absence of a transcript of the guilty plea hearing did not mandate allowing the defendant to withdraw the plea; (4) the interest in conserving judicial resources supported the denial of the motion to withdraw; and (5) the district court was justified in considering the prejudice to the Government more than three years after the defendant entered the original plea.

Affirmed.

1. Criminal Law 274(9)

There is no absolute right to withdraw guilty plea before imposition of sentence; rather, decision to allow withdrawal is left to sound discretion of district court. Fed. Rules Cr.Proc.Rules 11, 32(d), 18 U.S.C.A.

2. Criminal Law 274(1)

District court may consider totality of circumstances surrounding guilty plea in determining whether defendant has met his burden of showing fair and just reason for withdrawal of plea; factors to be analyzed include whether close assistance of counsel was available, whether plea was knowing and voluntarily, whether judicial resources would be conserved, and whether Government would be prejudiced if defendant were allowed to withdraw his plea. Fed. Rules Cr.Proc. Rules 11, 32(d), 18 U.S.C.A.

3. Criminal Law 274(1)

Good faith, credibility, and weight of defendant's assertions in support of motion to withdraw guilty plea are issues for district court to decide. Fed.Rules Cr. Proc. Rules 11, 32(d), 18 U.S.C.A.

4. Criminal Law 274(4)

Defendant could not complain of coercion

as basis for withdrawing his guilty plea where his appointed attorney, employing best professional judgment, recommended that defendant plead guilty. Fed. Rules Cr.Proc. Rules 11, 32(d), 18 U.S.C.A.

5. Criminal Law 274(6)

Any physical or mental impairment defendant had at time of his guilty plea hearing did not affect his decision to plead guilty where defendant had decided to plea guilty before hearing and, therefore, defendant was not entitled to withdraw his guilty plea. Fed.Rules Cr.Proc.Rules 11, 32(d), 18 U.S.C.A.

6. Criminal Law 274(8)

Mere declaration of innocence does not entitle defendant to withdraw his guilty plea. Fed.Rules Cr.Proc. Rules 11, 32(d), 18 U.S.C.A.

7. Criminal Law 274(3)

Absence of verbatim transcript of guilty plea hearing did not mandate allowing withdrawal of guilty plea; defendant never alleged or presented any evidence that district court did not comply in full with rule governing acceptance of plea and inadequacy of record was due, in no small part, to defendant's decision to flee jurisdiction and remain at large for almost three years after he entered his plea. Fed.Rules Cr.Proc. Rules 11, 32(d), 18 U.S.C.A.

10. Criminal Law 274(1,9)

District court was justified in considering time, money, and effort Government would have to devote to reassembling witnesses and evidence more than three years after defendant entered his guilty plea for purposes of determining whether defendant would be permitted to withdraw that plea. Fed.Rules Cr.Proc.

Rules 11, 32(d), 18 U.S.C.A.

Appeal from the United States District Court for the Southern District of Alabama.

Before RONEY, Chief Judge, CLARK, Circuit Judge, and MORGAN, Senior Circuit Judge.

MOREGAN, Senior Circuit Judge:

James Buckles appeals the district court's denial of his motion to withdraw his plea of guilty to four counts of violations of federal law. The district judge did not abuse his discretion in denying the motion, and, therefore, we affirm.

I. FACTS

On January 25, 1982, Buckles plead guilty to drug charges brought under 21 U.S.C. Sec. 841(a)(1) and to possession of firearms by a convicted felon in violation of 17 U.S.C. app. Sec 1202(a)(1). Imposition of sentence was postponed until

March 26, 1982. When Buckles failed to appear for sentencing, a warrant for his arrest was issued.

Almost three years later, Buckles was arrested in the Southern District of Georgia. Upon his return to the Southern District of Alabama, Buckles filed a motion under Fed.R.Crim.P. 32(d) to withdraw his guilty plea. Buckles alleged that he had entered his plea under duress caused by a combination of his appointed counsel's insistence that he plead guilty and his own mental impairment resulting from a physical illness.

An evidentiary hearing was held on the motion on December 16, 1985. At the hearing it was discovered that the verbatim transcript of Buckels' guilty plead had been either misplaced or lost and the tape recording of the plea was excessive background noise. Over Buckles' objection, the district court proceeded with the

evidentiary hearing. Upon the conclusion of the hearing, the district judge informed the parties that he was going to take the matter under submission and attempt to have the tape recording enhanced so that it would be comprehensible.

After it was advised that the tape recording could not be improved, the district court entered its order and memorandum opinion. The court determined that Buckles neither alleged nor offered any evidence that the court had failed in any way to comply with Fed.R.Crim.P. 11 in accepting Buckles' guilty plea. The court found that Buckles' decision to plead guilty was made prior to the Rule 11 proceeding. The district court rejected Buckles' testimony relative to his counsel's advice and his own physical condition at the time of his guilty plea as lacking in credence. The court concluded that Buckles had not presented any just or fair reasons for

withdrawing his guilty plea and, therefore, denied his motion.

1. In Stein v. Reynolds Securities, Inc., 667 F.2d 33,34 (11th Cir.1982), the Eleventh Circuit declared the decision issued by Unit B of the Fifth Circuit to be binding precedent for the circuit.

II. DISCUSSION

[1] Buckles contends that the district court abused its discretion in denying his motion to withdraw because his guilty plea was not voluntarily and the lack of a record of the Rule 11 proceeding requires reversal. Rule 32(d), in pertinent part, states "[i]f a motion for withdrawal of a plea of guilty ... is made before sentence is imposed, ,,, the court may permit withdrawal of the plea upon a showing by the defendant of any fair

and just reason." This portion of the Rule, concerning pre-sentence motions to withdraw, is to be liberally construed. United States v. Rasmussen, 642 F.2d 165, 167 (5th Cir. Unit B 1981). It is well settled, however, that there is no absolute right to withdraw a guilty plea prior to imposition of a sentence. The decision to allow withdrawal is left to the sound discretion of the trial court. United States v. Stitzer, 785 F.2d 1506, 1514 (11th Cir.) cert. denied sub nom. Perna v. United States - U.S. -, 107 S. Ct. 93, 93 L.Ed.2d 44 (1986); United States v. Morrow, 537 F.2d 120 (5th Cir. 1976), cert denied sub nom. Brennen v. United States 430 U.S. 956, 97 S.Ct. 1602, 51 L.Ed2d 806 (1977); United States v. Simmons, 497 F.2d 177 (5th Cir), cert. denied, 419 U.S. 1048, 95 S.Ct. 623, 42 L.Ed.2d 643 (1974), reh'g denied, 420 U.S. 913, 95 S.Ct. 837, 42 L.Ed.2d 844 (*1975); United States v. Arredondo, 447

F.2d 976 (5th Cir.1971), cert, denied, 404 U.S. 1026, 92 S.Ct. 683, 30 L.Ed.2d 676 (1972); DeLeon v. United States, 355 F.2d 286 (5th Cir. 1966). The district Court may be reserved only if its decision is arbitrary or unreasonable. PPG Industries, Inc. v. Continental Oil Co., 478 F.2d 674, 682 (5th Cir.1973); Delno v. Market Str.Rv. Co., 124 F.2d 965, 967 (9th cir. 1942).

[2,3] Under Rule 32(d), the defendant has the burden of showing a "fair and just reason" for withdrawal of his plea. United States v. Lombardozzi, 436 F.2d 878, 881 (2d Cir.), cert. denied 402 U.S. 908, 91 S.Ct. 1379, 28 L.Ed.2d 648 (1971). In determining whether the defendant has met this burden, the district court may consider the totality of the circumstance surrounding the plea. United States v. Gonzalez-Mercado, 808 F.2d 796, 798-799 (11th Cir. 1987). See Morrow, 537 F.2d at 146. Factors analyzed include (1) whether close assistance of counsel was

available; (2) whether the plea was knowing and voluntary; (3) whether judicial resources would be conserved, United States v. Pressley, 602 F.2d 709, 711 (5th Cir. 1979); and (4) whether the government would be prejudiced if the defendant were allowed to withdraw his plea. see Gonzales-Mercado, 808 F.2d at 799 n. 6; Rasmussen, 642 F.2d at 168. The good faith, credibility and weight of a defendant's assertions in support of a motion under Rule 32(d) are issues for the trial court to decide. United States v. Becklean, 598 F.2d 1122, 1126 (8th Cir.), cert. denied, 444 U.S. 864, 100 S.Ct. 135, 62 L.Ed.2d 87 (1979); Meyer v. United States, 424 F.2d 1181, 1190 (8th Cir.) cert. denied, 400 U.S. 853, 91 S.Ct. 92,. 27 L.Ed.2d 91 (1970); United States v. Washington, 341 F.2d 277, 281 (3d Cir.) cert. denied, 382 U.S. 850, 86 S.Ct. 96, 15 L.Ed.2d 89, reh'g denied, 382 U.S. 933, 86 S.Ct. 317, 15 L.Ed.2d 346 (1965); United

States v. Nigro, 262 F.2d 783, 787 (3d Cir. 1959).

Assistance of Counsel

At the December 1985 evidentiary hearing, Buckles alleged that despite several futile attempts on his part, he and his appointed Counsel Barber ("Bob") Sherling, had met only once, on the Friday before the Monday morning Rule 11 proceeding. Buckles asserted that at that time Sherling did not discuss Buckles' case except to advise Buckels that unless he plead guilty he would receive the maximum penalty on the basis of numerous incriminating FBI tapes. Buckles contended that when he arrived on the following Monday prepared to go to trial Sherling again told him to plead guilty even though Buckles had averred that he was innocent.

Sherling testified that it was Buckles who had failed to show up for appointments to discuss the case. Sherling maintained

that he had recommended Buckles plead guilty only after he had explained the case fully to him, that the discussion had taken place prior to the date of Buckles' Rule 11 proceeding, and that Buckles; decision to plead guilty occurred before the morning of the Rule 11 proceeding.

[4-6] The district court rejected Buckles' assertion that he had entered his guilty plea under duress from Sherling as lacking in credence. "All pleas of guilty are the result of some pressures or influences on the mind of the defendant." Schnautz v. Beto, 416 F.2d 214, 215 (5th Cir. 1969(. A defendant cannot complaint of coercion where his attorney, employing his best professional judgment, recommends that the defendant plead guilty. See id.; Anderson v. Henderson, 439 F.2s 711, 712 (5th Cir. 1971); United States vs. Jones, 392 F.2d 567, 569.(4th Cir.) cert denied, 393 U.S. 882, 89 S.Ct. 186, 21 L.Ed.2d 156

(1968). The district court determined that Buckles had decided to plead guilty prior to the Rule 11 Proceeding so that any physical or mental impairment had had at the time of the proceeding did not effect his decision. Furthermore, the court found Buckles' "belated assertion" of innocence to be unconvincing. A mere declaration of innocence does not entitle a defendant to withdraw his guilty plea. See Government of Virgin Islands v. Berry, 631 F.2d 214, 220 (3d Cir. 1980); United States v. Barker, 514 F.2d 208, 220-222 (D.C.Cir.), cert. denied, 421 U.S. 1013, 95 S.Ct. 2420, 44 L.Ed.2d 682 (1975). Guilty pleas would be of little value to the judicial system if a defendant's later conclusory assertion of innocence automatically negated his plea. See id. at 221.

Knowing and Voluntary Plea

Buckles contended at the hearing that on the day he had plead guilty he was

physically ill and mentally impaired by prescription medicine and thus his plea had not been voluntary. Buckles asserted that he had had a respiratory infection with a high fever and had taken someone else's prescription paid killers and several other medications containing codeine. Buckles testified that he had informed the judge he was taking cough syrup but had said nothing about the pain killers. Buckles contended that he had only a hazy recollection of the rest of the plea hearing and could not remember what else the judge had asked or told him.

[7] Buckles now argues that the district court should have allowed him to withdraw his plea because without the Rule 11 hearing transcript to refute his allegations there was no other evidence for the court to consider. Buckles contends that the absence of a verbatim transcript mandates a reversal and an opportunity for

Buckles to "plead anew".

When a defendant decides to plead guilty, Fed.R.Crim.P. 11 requires that a colloquy take place between the judge and the defendant, personally, to ensure the plea is intelligently and voluntarily made, and there is factual basis of the plea. see United States v. Dayton, 604 F.2d 931, 935 (5th Cir. 1979) (en banc), cert denied, 445 U.S. 904, 100 S.Ct. 1080, 63 L.Ed.2d. 320 (1980). Rule 11 explicitly directs the district judge not to accept a plea without determining these "core concerns." Therefore, on review we "are warranted in regarding the court's acceptance of the plea as a positive finding on each [component of the Rule]..." Dayton, 604 F.3d at 940-41.

A verbatim record must be made of the colloquy between the district judge and the defendant at the time of plea proceedings. Fed.R.Crim.P. 11(g). In the case at bar, a verbatim record was made of the Rule 11

proceeding as attested to by the available tape recording. Buckles contends, however, that because the district court could not produce a transcript of the proceeding, his plea should be automatically thrown out.

In McCarthy v. United States, 394 U.S. 459, 89 S.Ct. 1155, 22 L.Ed.2d. 418 (1969), where the district judge completely failed to personally inquire whether the defendant understood the nature of the charge, the Supreme Court held that any noncompliance with Rule 11 constituted reversible error. At that time, however, Rule 11 was a relatively short and general pronouncement. After Rule 11 was substantially amended and expanded in 1975, the Fifth Circuit sitting en banc determined that not all "fallings off" from Rule 11 require an automatic reversal. Dayton, 604 F.2d at 940. Only when one of the "core concerns" of the Rule is not addressed, should the reviewing court disturb the district court's determination.

See id.

[8] In the case at bar, Buckles never alleged nor presented any evidence that the district judge did not comply in full with Rule 11, See United States vs. Coronado, 554 F.2d 155, 171 (5th Cir.), cert. denied, 434 U.S. 870, 98 S.Ct. 214, 54 L.Ed.2d 149 (1977) (defendant did not contend Rule 11 proceeding itself wad deficient; district court therefore did not err in accepting plea). Buckles contended little more than that he had not wanted to plead guilty, that he does not remember much of the Rule 11 proceeding and since the transcript is missing, he should be allowed to plead anew. Mere conclusory allegations do not warrant the withdrawal of a guilty plea. see Rasmussen, 642 F.2d at 168-69. This was not a case wherer the distric judge entirely failed to address the core concerns or where the court failed to make a record at the time of the proceeding. As the district

judge stated, the inadequacy of the Rule 11 record is due in no small part to Buckles' decision to flee the jurisdiction and remain at large for almost three years. The longer the delay between the entry of the pleaand the motion to withdraw it, the more substantial the reasons must be as to why the defendant seeks withdrawal. See Barker, 514 F.2d at 222. Buckles did not present any substantial reason to support his motion to withdraw. Moreover, Buckles admitted at the evidentiary hearing that he had plead guilty previously to a crime. Thus, he was not unfamiliar with plea proceedings.

Judicial Resources

[9] The district court found that enough judicial resources have been expended in this case. Cf. United States v. Carr, 740 F.2d 339, 345-46 (5th Cir.1984), crt. denied, 471 U.S. 1004, 105 S.Ct. 1865, 85 L.Ed.2d 159 (1985) (district judge's assessment of effect on judicial resources

to be accorded substantial deference since he "is in the best position to know the effect the withdrawal had on it resources."). Buckles received both a complete Rule 11 proceeding and a full evidentiary hearing on the matter. Buckles' own conduct necessitated expenditure of time and money to effect his recapture and caused a long, inordinate, and inexcusable delay in finalizing this case.

Prejudice to the Government

[10] Although a district court need not find prejudice to the government before it can deny a defendant's motion to withdraw, it may take this factor into account when assessing the defendant's motion. see supra note 2 and accompanying text; Rasmussne, 642 F.2d at 168 n 6; Lombardozzi, 436 F.2d at 881. Due to Buckles' fugitive status from 1982 to 1985, the district court was justified in considering the time, money, and effort the

government would have to devote to reassembuling witnesses and evidence that were allowed to scatter after the acceptance of the guilty plea.

III. CONCLUSION

In assessing this case the district judge's findings of fact were not clearly erroneous. He did not abuse his discretion in denying Buckles' motion to withdraw his guilty plea. We, therefore, affirm.